

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN ANTHONY ALVAREZ,

Defendant and Appellant.

B260814

(Los Angeles County
Super. Ct. No. KA104486)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mike Camacho, Judge. Affirmed as modified with directions.

Ava R. Stralla, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Stephanie C. Brenan and Toni R. Johns Estaville, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendant, Steven Anthony Alvarez, of: willful corporal injury infliction (Pen. Code, § 273.5, subd. (a))¹; misdemeanor assault (§ 240); and false imprisonment. (§ 236.) The trial court found a prior serious felony conviction allegation to be true. (§§ 667, subd. (d), 1170.12, subd. (b).) The trial court further found a section 667.5, subdivision (b) prior prison term allegation arising from case No. VA098455 was true. Defendant's sole contention on appeal is that there was insufficient evidence to prove the prior separate prison term enhancement. We agree. We modify defendant's sentence accordingly.

II. DISCUSSION

A. The Prior Prison Term Enhancement

As noted, defendant contends there was insufficient evidence to support the prior prison term finding arising from case No. VA098455. Section 667.5, subdivision (b) provides: “[W]here the new offense is any felony for which a prison sentence . . . is imposed . . . , in addition and consecutive to any other sentence therefore, the court shall impose a one-year term for each prior separate prison term . . . ; provided that no additional term shall be imposed under this subdivision for any prison term . . . prior to a period of five years in which the defendant remained free of both the commission of an offense which results in a felony conviction, and prison custody. . . .” Our Supreme Court set forth the elements of a prior prison term enhancement in *People v. Tenner* (1993) 6 Cal.4th 559, 563: “Imposition of a sentence enhancement under . . . section 667.5 requires proof that the defendant: (1) was previously convicted of a felony; (2) was

¹ Further statutory references are to the Penal Code unless otherwise noted.

imprisoned as a result of that conviction; (3) completed that term of imprisonment; and (4) did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. [Citation.]” (Accord, *In re Preston* (2009) 176 Cal.App.4th 1109, 1115.) As Division Four of the Court of Appeal for this appellate district further explained in *People v. Fielder* (2004) 114 Cal.App.4th 1221, 1233, “[A] defendant will gain the benefit of the ‘washout’ period if for any five-year period following discharge from prison custody or release on parole, he remains free of both prison custody and the commission of an offense resulting in a felony conviction. (See *People v. Superior Court (Henkel)* (2002) 98 Cal.App.4th 78, 84; *People v. Jackson* [(1983)] 143 Cal.App.3d 627, 631.)” (Italics omitted.)

In the trial court, it is the prosecution’s burden to prove beyond a reasonable doubt every element of an alleged sentence enhancement. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065; *People v. Tenner, supra*, 6 Cal.4th at p. 566.) This includes the section 667.5, subdivision (b) prior prison term enhancement and the absence of a “washout” period. (*People v. Fielder, supra*, 114 Cal.App.4th at p. 1232; *People v. Elmore* (1990) 225 Cal.App.3d 953, 959-960.) On appeal we consider: “[W]hether a reasonable trier of fact could have found that the prosecution sustained its burden of proving the enhancement beyond a reasonable doubt. In that regard, in conformity with the traditional rule governing appellate review, we must review the record in the light most favorable to the trial court’s finding(s). ([*People v. Elmore, supra*, 225 Cal.App.3d] at pp. 959-960.)” (*People v. Fielder, supra*, 114 Cal.App.4th at p. 1232; accord, *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 129.)

Here, the information alleges a single prior prison term enhancement based on case No. VA098455. A bench trial was held on the prior prison term allegation. The prosecution presented evidence defendant was sentenced on September 18, 2007, for being a felon in possession of a firearm in case No. VA098455. (Former § 12021, subd. (a)(1), now § 29800, subd. (a)(1).) The only evidence on the subject shows defendant was paroled on November 19, 2008. The five-year “washout” period commenced when defendant was released from prison and placed on parole. (§ 667.5, subd. (d); *People v.*

Fielder, supra, 114 Cal.App.4th at pp. 1232-1233; *People v. Nobleton* (1995) 38 Cal.App.4th 76, 85-85.) Defendant committed the present offenses on January 27, 2014, five years, two months after he was paroled in case No. VA098455. Thus, defendant remained free of prison custody and the commission of an offense resulting in a felony conviction for more than five years. The evidence was insufficient to support the section 667.5, subdivision (b) prior prison term enhancement.

On appeal, the Attorney General relies for the first time on a felony conviction in case No. GA091723 to prove defendant did not remain free for five years of both prison custody and the commission of a new offense resulting in a felony conviction. The felony conviction in case No. GA091723 is reflected in the probation officer's preconviction report. However, the prosecution offered no evidence with respect to case No. GA091723 in the trial court in support of a prior prison term enhancement. And, defendant made no admission concerning case No. GA091723. Thus the prosecution forfeited the right for the first time on appeal to rely on defendant's commission of the new offense in case No. GA091723. (*People v. Anderson* (2009) 47 Cal.4th 92, 121-122; *People v. Najera* (1972) 8 Cal.3d 504, 508-587, disapproved on another ground in *People v. Wiley* (1995) 9 Cal.4th 580, 588-587; *People v. Botello* (2010) 183 Cal.App.4th 1014, 1028-1029; *People v. Salas* (2001) 89 Cal.App.4th 1275, 1282-1283; *People v. Spencer* (1972) 22 Cal.App.3d 786, 801.)

Defendant requests we judicially notice documents in case No. GA091723. Defendant argues his felony conviction in that case was reduced to a misdemeanor. Because we will not consider the case No. GA091723 issue in terms of whether there was sufficient evidence in support of the prior prison term enhancement, judicial notice of the documents is unnecessary. (*Siskiyou County Farm Bureau v. Department of Fish & Wildlife* (2015) 237 Cal.App.4th 411, 441, fn. 16; *People v. Brewer* (2015) 235 Cal.App.4th 122, 143.) Additionally, none of the documents which are the subject of defendant's judicial notice request were presented in the trial court. Hence, they may not be judicially noticed for the first time on appeal. (*Haworth v. Superior Court* (2010) 50

Cal.4th 372, 379, fn. 2; *People v. Farwell* (2015) 241 Cal.App.4th 1313, 1324, fn. 3; *People v. Jackson* (2012) 210 Cal.App.4th 525, 539, fn. 4.)

B. The Abstract of Judgment

Defendant was convicted of misdemeanor assault (§ 240), a lesser included offense to that charged in count 2. The trial court sentenced defendant to six months and stayed the sentence under section 654, subdivision (a). That sentence was not included in the abstract of judgment. The abstract of judgment must be amended to so reflect. (See *People v. Capistrano* (2014) 59 Cal.4th 830, 887-888; *People v. Andrews* (2015) 234 Cal.App.4th 590, 607; *People v. Anaya* (2007) 158 Cal.App.4th 608, 611, fn. 1, 614.)

III. DISPOSITION

The judgment is modified to strike the one-year enhancement under Penal Code section 667.5, subdivision (b), and to reflect a sentence of 19 years, 4 months in state prison. The judgment is affirmed in all other respects. Within 60 days of the issuance of the remittitur, the prosecutors may retry the prior prison term issue. Once the prior prison term issue is resolved, the superior court clerk is to prepare an amended abstract of judgment reflecting the modified sentence imposed and also including the stayed misdemeanor sentence imposed on count 2. The superior court clerk is to deliver a copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

MOSK, J.

BAKER, J.